UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 820

Case No. 910: WONG

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, at the request of Dennis J. Wong, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal until 31 December 1995 and 28 February 1996;

Whereas, on 28 February 1996, the Applicant filed an application requesting the Tribunal:

"...

(b) To declare that both the Secretary-General and myself are bound by the terms and conditions of the contract of employment as stipulated in [the Officer-in-Charge, General Service Staffing Section, Officer of Human Resources Management]'s memorandum dated 27/7/93 (...), particularly with respect to the term of assignment (i.e. six months) and its penalty phase provided therein in case of default by either party;

(c) To find that 'my forced repatriation' to New York and 'termination of my assignment to Haiti' by [the] Secretary-General two months ahead of the term mutually agreed upon violated my contractual rights;

(d) To declare that I am entitled to be compensated DSA [daily subsistence allowance] + mobility and hardship

allowance in Haiti to the tune of $143 per day for two months (i.e. January and February, 1994) - being the remaining term of my assignment which I was supposed to have performed but was instead prevented from so doing due to 'extraneous factors' involved;

(e) To order that I be awarded the sum of no less than two years' net base salary at my present grade and level as compensation for the monetary, psychological and professional injury suffered;

(f) To order that I be given 9-day compensatory time off (CTO) for the accrued MSA [mission service allowance] leave due me at the rate of 1 1/2 days per month for six months, [to] which leave I am entitled but was prevented from exercising due to 'extraneous factors' involved."

Whereas the Respondent filed his answer on 3 May 1996;

Whereas the Applicant filed written observations on 30 October 1996;

Whereas, on 3 July 1997, the Tribunal put questions to the Respondent, to which he provided answers on 9 July 1997;

Whereas, on 11 July 1997, the Applicant submitted additional comments on the Respondent's submission of 9 July 1997;

Whereas, on 17 July 1997, the Respondent submitted additional comments to the Tribunal;

Whereas, on 21 July 1997, the Tribunal put further questions to the Respondent, to which he provided answers on 22 and 23 July 1997;

Whereas, on 21 and 30 July 1997, the Applicant submitted additional comments to the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 4 May 1970, as an Accounting Clerk in the Office of the Secretary-General, Office of the Controller, Accounts Division, on a fixed-term appointment, at the GS-3, step III level. The Applicant's appointment was converted to probationary on 4 August 1970. On 1 May 1972, he was granted a permanent appointment and promoted to

the GS-4 level. His functional title was changed to Senior Accounting Clerk. On 1 January 1985, his grade level changed to GS-5 on conversion to the new classification standard system and his functional title became Accounting Assistant. On 1 July 1992, the Applicant was promoted to the GS-6 level.

On 28 July 1993, the Office of Human Resources Management (OHRM), informed the Applicant that he had been selected for an assignment to the International Civilian Mission in Haiti (MICIVIH), "initially for a period of six months with [the] possibility of extension subject to medical clearance and release from your department." On 30 July 1993, the Applicant agreed.

On 28 August 1993, the Applicant arrived at Port-au-Prince. On 17 September 1993, he was designated as Alternate Approving Officer, to work under the Chief Finance Officer.

On 15 October 1993, due to the rapid turn of events and the rising level of threats to UN personnel in Haiti, the Designated Official, MICIVIH, requested the Under-Secretary-General for Administration and Management (USG/A&M), who was also the United Nations Security Coordinator, to approve the suspension of operations. Accordingly, the mission in Haiti was suspended. MICIVIH staff were to be relocated by air charter to the safehaven, Santo Domingo, the Dominican Republic, beginning on the evening of 15 October 1993. On 15 October 1993, the security plan was approved.

On 12 November 1993, the Assistant Secretary-General and Senior Political Advisor to the Secretary-General requested the USG/A&M to extend the evacuation status of MICIVIH, in light of a possible change in the situation in Haiti and because of President Aristide's request that MICIVIH return to Haiti. On 17 November 1993, the USG/A&M informed the Designated Official, Santo Domingo, that, "on an exceptional basis", authorization had been given for the extension of DSA payments through 30 November 1993, for those staff who were required to remain in Santo Domingo.

On 29 November 1993, the Chief Administrative Officer (CAO) and the Personnel Officer (PO), MICIVIH, Port-au-Prince, informed the Field Operations Division (FOD), inter alia, that "[the Applicant] wishes to return to Headquarters". On 9 December 1993, the CAO and the PO, MICIVIH, Port-au-Prince, informed the Officer-in-Charge, MICIVIH, Santo Domingo, as follows: "[R]equest of [the Applicant] for leave not approved. His services still needed at Santo Domingo. By the end of December he will return to his parent department at Headquarters."

On 10 December 1993, the FOD sent a facsimile to MICIVIH, informing them of the decision to extend payment of DSA to MICIVIH staff in Santo Domingo until 31 December 1993, or until "such time as another decision is taken regarding the matter, whichever is sooner."

On the same date, the Officer-in-Charge, MICIVIH, Santo Domingo, informed the CAO and the PO, that "[the Applicant] requests [to] rejoin MICIVIH in Port-au-Prince, Haiti, beyond December 31, 1993, even though it may then still not be officially recalled."

On 20 December 1993, the CAO and the PO, MICIVIH, Port-au-Prince, confirmed in writing to the FOD, New York, that the Applicant had "expressed his willing[ness] to be assigned to UNAMIR [United Nations Assistance Mission in Rwanda], immediately following his assignment to Santo Domingo."

On 30 December 1993, the CAO and the PO, MICIVIH, Port-au-Prince, informed MICIVIH, Santo Domingo, as follows: "We have been informed by FOD that [the Applicant] is not selected for [an]other mission assignment. Therefore, you are authorized to arrange his return to his parent department soonest possible."

On 31 December 1993, the Applicant wrote to the CAO, PO and Chief Finance Officer requesting, inter alia, that he rejoin the MICIVIH, Port-au-Prince, "in order to fulfil [his] contractual obligation of staying six (6) months on mission", until 28 February 1994. The Applicant's mission assignment ended on 31 December 1993,

by which time most, if not all, MICIVIH staff had been reassigned, or repatriated to their home country. On 1 January 1994, the Applicant travelled to New York.

The Applicant was on annual leave from 3 January 1994 until 25 January 1994, when he reported to duty in New York. On his return to Headquarters, the Applicant found that his post was encumbered by a new recruit, until March 1994. The Applicant requested, and was granted, leave of absence in January and February 1994.

On 25 February 1994, the Applicant wrote to the Secretary-General requesting a review of the administrative decision to curtail his mission assignment two months prior to its expiration date.

On 22 June 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 21 July 1994, the Personnel Officer, OHRM, responded to the Applicant, stating that his claims had been reviewed and that OHRM was willing to consider favourably the Applicant's claim for the education grant for his two sons while rejecting the Applicant's other claims for: (i) DSA at $123.00, plus $20.00 daily hardship allowance for a period of two months, i.e. January and February 1994; (ii) the balance of entitlement to airfare to Malaysia upon repatriation; and (iii) a finding that his absence on annual leave during January and February 1994 be considered "special leave" and the annual leave credit restored to him.

On 19 August 1994, the Applicant wrote to the Secretary of the JAB, informing him that he agreed with OHRM's disposition of two of his claims, namely, payment of the education grant and the rejection of his claim regarding airfare to Malaysia upon repatriation.

The JAB adopted its report on 1 June 1995. Its conclusions and recommendations read, in part, as follows:

"...

42. The majority of the Panel concluded that the consent given by the staff member to go on mission had not created a new legal[ly] binding addition to the [contract between the] staff member and the administration, [the conditions of] which were already stipulated in the letter of appointment, the Staff Regulations, Staff Rules and Administrative Instructions.

...

48. The Panel, however, examined the term 'the Grace Period' which appeared in the Security Handbook. It was explained that '[a]t the end of the 'evacuation status' period, personnel for whom the employing agency has not yet found a further assignment and who are not to be terminated may be granted a 'grace period' of the duration not to exceed three months.' The Panel considered that the Appellant, being a permanent staff member of the UN Secretariat, had been detailed to MICIVIH, and upon completion of his mission was reassigned to his original duty station, therefore did not fall into the category of those who were entitled to be granted the 'Grace Period' entitlement.

...

51. The Panel understood the Appellant's frustration in coming back to his office, despite his wish to stay on mission, and finding another person doing his work. Nevertheless, the Panel was not informed that during that period, the Appellant was deprived of his salary and other entitlements, granted to a staff member at Headquarters. The Panel noted that the Appellant was not forced to take the leave of absence and he took it at his own request.

52. In view of the above considerations, the majority of the Panel recommends no action in support of this appeal.

53. As to the question of whether the appellant was entitled to have his 'absence on annual leave' in January and February 1994, converted to 'special leave with pay', the Panel unanimously recommends that the Secretary-General reject this request."

However, there was a dissenting opinion written by one member of the JAB Panel. Its conclusions and recommendations read, in part, as follows:

"(a) [The Officer-in-Charge, General Service Staffing Section, Division of Recruitment and Placement, OHRM]'s memorandum dated 28 July 1993 clearly indicated the name, location and duration of the mission to which the Appellant was assigned. ...

(b) The Appellant had given his consent and signed the above-mentioned memorandum. Therefore he was obliged to fulfil his obligations for the six month period. Any decision barring him from returning to Haiti had violated his rights.

(c) Furthermore, the above-mentioned memorandum spelled out what are the obligations required from a locally-recruited General Service staff member for a particular assignment. The obligations under paragraph 4 of PD/3/81/REV.1, set forth in the above mentioned memorandum, creates a specific obligation, in addition to the terms of appointment of staff members, which bind staff and Administration. If a locally recruited General Service staff member is subject to the Staff Regulations and Rules, which is a legally binding contract between him and the Secretary-General, then the same applied to the above obligations under PD/3/81/REV.1. Therefore, the Appellant's signature on [the Officer-in-Charge, General Service Staffing Section, Division of Recruitment and Placement, OHRM]'s memorandum creates a legally binding contract."

On 26 June 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's considerations and recommendations, including the dissenting opinion. The Secretary-General has noted in particular the findings by the majority of the Board members that the consent given by you to go on mission had not created a new legally binding obligation to those already stipulated in your letter of appointment and in the staff Regulations and Rules. Likewise, the majority of Board members have concluded that you had not been deprived of your salary and other entitlements, granted to a staff member at Headquarters and it recommends no action in support of your appeal.

> As regards the dissenting view expressed by a minority Board member, the Secretary-General takes exception with this interpretation given to a memorandum of 28 July 1993, which would have the effect of amending the basic work conditions established by Staff Regulations and Rules. The Secretary-General has decided, accordingly, to take no further action on your case."

On 28 February 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Secretary-General is bound by the terms and conditions of the Applicant's contract of employment to be assigned to mission duty for six months.

2. The termination of the Applicant's assignment two months prior to its term was a breach of contract.

3. As a consequence, the Applicant is entitled to the benefits that would have accrued to him had the mission assignment not been terminated prior to its expiration date.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has the discretion to assign and re-assign staff and the termination of the Applicant's mission assignment prior to its term was not a breach of his contract.

2. The decision to send the Applicant back to Headquarters was not motivated by prejudice or other extraneous factors.

3. Mission allowances are payable only for the actual period of mission service.

The Tribunal, having deliberated from 1 to 25 July 1997, now pronounces the following judgement:

I. The basic question in this case is whether the parties, by agreeing that the Applicant should go on a mission to Haiti for a period of six months from 28 August 1993, had entered into a new contractual arrangement.

II. The Applicant argues that inasmuch as the Applicant signed a memorandum from the Respondent in the following terms, a binding contract was established between the Applicant and the Respondent. The terms of the memorandum in question read:

> "Once a locally-recruited General Service staff member selected for a particular assignment has given his or her consent in writing, the staff member shall proceed to the mission area and report for duty on the agreed date. Such a staff member, having formally given his or her consent, has the obligation under staff regulation 1.2 to perform the assignment and cannot unilaterally refuse to fulfil either totally or partly that obligation. Failure to do so may result in sanctions under the Staff Regulations and Rules."

III. The Respondent contends that this memorandum creates no basis for a contractual claim that the Respondent is under an obligation to employ the Applicant on a mission assignment for a specified term; rather it was meant to underline that the Respondent may make such a demand on the staff member under staff regulation 1.2, which, by providing that "staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations", gives the Secretary-General discretion and authority to assign and reassign a staff member according to the exigencies of the service.

IV. The Joint Appeals Board (JAB) carefully considered this point and the majority view was that "the consent given by the staff member to go on mission had not created a new legal[ly] binding addition to the [contract between the] staff member and the administration." A dissenting opinion in the JAB held that the

Applicant's signature to the memorandum cited in paragraph II above had "create[d] a legally binding contract".

V. The Tribunal has examined the two points of view and concludes that the obligation required of the staff member while posted on a mission cannot and should not create a right for him to serve abroad; a staff member cannot insist that the Respondent keep him on a mission duty, irrespective of circumstances. The Respondent has no such obligation.

VI. In the light of this conclusion, the Tribunal examined the four specific demands made by the Applicant:

> "a). Education Grant on a pro-rata basis for my two children who have been in colleges since September, 1993.
>
> b). Two months DSA [daily subsistance allowance] at US$143.00 per day representing DSA at Port-au-Prince plus $20 hardship allowance for the months of January & February, 1994. The reason is that I wanted but was prevented from returning to Haiti to serve out the rest of my term.
>
> c). Balance of entitlement to airfare to my country, Malaysia, upon repatriation as it was indicated as a 'preferred destination' in the questionnaire sheet filled out earlier and as it is covered under the provision of the 'Security Handbook' on evacuation.
>
> d). Restoration of service credits for annual leave, though taken by me, during the months of January and February, 1994 as the entire evacuation period, pursuant to [the] relevant provision in the 'Security Handbook', is to be looked upon as 'special leave with full pay'."

VII. Of these four claims, two (the Education grant and a repatriation entitlement, (a) and (c) above respectively), have been settled. Of the other two, the JAB unanimously found that the "Restoration of service credits for annual leave" as mentioned in (d) above was not admissible. The Tribunal agrees with this

unanimous view of the JAB and notes that during the period the Applicant was on leave at Headquarters in New York, he suffered no financial loss since he was drawing his regular salary and related benefits.

VIII. The Tribunal examined the only outstanding claim, which concerned "two months DSA at US$143.00 per day[,] representing DSA at Port-au-Prince plus $20 hardship allowance for the months of January and February, 1994." The reason for this claim, the Applicant asserts, is that he "wanted but was prevented from returning to Haiti to serve out the rest of my term" (emphasis in original).

The Tribunal considers that the claim is directly related to the confusion in the Applicant's mind, between his obligation to serve for six months in Haiti and a perceived contractual right to do so. The Tribunal has already indicated that he had no such right, and therefore holds that his claim for DSA in Haiti, when he was no longer serving there, cannot be sustained. There is also no provision for such payment in the Staff Regulations and Rules, as indeed has been pointed out by the JAB.

IX. The Tribunal was concerned by the Applicant's allegation that "[he] was the only one in the Administration singled out for curtailment". It therefore made enquiries of the Respondent as to the circumstances in which the Applicant returned to his duty station at Headquarters in New York. The Respondent's reply, together with the evidence available from the files, convinces the Tribunal that (a) there was no discrimination against the Applicant, and (b) it is not necessary to consider whether the Applicant returned to New York of his own volition or whether his return was brought about by the political circumstances prevailing in Haiti at the time. In any event, the Tribunal finds no evidence that the contractual rights of the Applicant had been violated.

X. In view of the foregoing, the application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary